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IN THE

Supreme Court of the United States

October Term, 1966
No. 1036

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FLEETWOOD TRAILER CO., INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

Respondent accepts Petitioner's reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

Question Presented.

Whether the Court of Appeals correctly determined that the Board's finding that the positions of six economic strikers had not been absorbed or abolished was not supported by substantial evidence on the record taken as a whole?

Statement of Fact.

On August 5, 1964,[1] the Company, a manufacturer of mobile homes, had about 110 employees and was

[1]All dates hereinafter are in 1964.

scheduling production at the rate of 20 units per week [App. B, p. 30; Tr. 75, 98-99, 101, 103-104, 108, 122; Resp. Ex. 2].[2] On the following day, as a result of a breakdown in collective bargaining negotiations between the Company and the Union,[3] about half of the employees struck in support of their contract demands [App. B, p. 29; Tr. 100, 122]. It is conceded to have been an ordinary economic strike [Pet. p. 7, n. 7]. Upon commencement of the strike, the Company cut back its production schedule to ten units per week and reduced orders for materials accordingly [App. B, p. 30; Tr. 73, 76, 101-102, Resp. Ex. 2].

By August 18, the Company had hired about 20 new employees and some strikers had returned to work, so that its work force had increased to 71, sufficient work force to produce 15 units [App. B, p. 29; Tr. 76, 102, 109, 122; G.C. Ex. 11]. On that date, the Union ended the strike, accepted the Company's last contract offer, and requested reinstatement of the remaining strikers [App. B, p. 29; Tr. 63-66].

At the end of the strike it would have required a maximum of thirty days for the Company to overcome the physical problems caused by the strike and to return to pre-strike production levels [App. A. p. 18; Tr. 72-

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[2]"Tr." refers to the stenographic transcript of the unfair labor practice hearing, "G.C. Ex." refers to the NLRB General Counsel's exhibits, and "Resp. Ex." refers to the respondent Company's exhibits. These documents, together with "Volume 1, Pleadings," comprised the record in the Court of Appeals, and certified copies thereof have been filed with the Petition. "App." refers to appendices to the Petition for Certiorari, Appendix A being the Opinion of the Court of Appeals for the Ninth Circuit, and Appendix B being the Decision of the National Labor Relations Board. "Pet." refers to the Petition for Certiorari herein.

[3]San Bernardino-Riverside Counties (California) District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America AFL-CIO.

73]. However, at that time, taking into account the supply of inventory units, and current production, the Company determined not to increase employment or production [App. A, pp. 18-19; Tr. 95-96]. That the Company's determination was made in good faith and was correct is proven by the undisputed fact that at the date of the openings here in contention, almost two months later [App. A, p. 18; Tr. 112] the work force actually decreased from seventy-one employees at the end of the strike to sixty-eight employees,[4] and production was 14 units, one less than capacity at the end of the strike [Tr. 103-104; Resp. Ex. 2]. Pre-strike production levels were not reached for almost five months after the strike ended [Tr. 104].

During the period October 8 through October 16, the Company filled six positions without giving preference to the complainant strikers. All the complainants were, however, hired for other positions shortly thereafter [Pet. p. 4].

The National Labor Relations Board concluded that the reduced production was only temporary and that the jobs had not been abolished. It therefore concluded that the Company had discriminated against the complainants as unreplaced strikers [App. B, p. 33].

The Court of Appeals, correctly referring to and applying the doctrine on scope of review established in *Universal Camera Corp. v. Labor Bd.* (1951), 340 U.S. 474, 487, found that the "General Counsel is unable to support the decision of the Board with

[4]The figure of 68 employees in early October is computed from the fact that subsequent to hiring of the six replacements which are the subject of this dispute, Fleetwood had only 74 employees [Tr. 112].

substantial evidence on the record taken as a whole. . . ." and held that "the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [App. A, p. 19].

Reasons Why Writ Should Not Be Granted.

1. Certiorari should not be granted because this case involves only a determination of fact decided under the rule established in *Universal Camera, supra.* Petitioner does not contend that the Court of Appeals relied upon any incorrect principle of law. It states at page 8 of the Petition the correct governing principle of law, *i.e.,* that strikers whose jobs have been abolished or absorbed have been replaced. The only issue it raises is whether the Circuit Court correctly applied this principle to the facts of this case. The Petitioner states:

> "The court below, in treating temporary job unavailability as the equivalent of job abolition, departed from these settled principles." (Pet. p. 8).

The Court did not treat "temporary job unavailability" as replacement. It found:

> ". . . . the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [App. A, p. 19].

In reaching its conclusion the Court applied the correct standard of *Universal Camera, supra* saying "the General Counsel is unable to support the decision of the Board with substantial evidence on the record taken as a

whole. . . ." [App. A, p. 19]. Its analysis in full is as follows:

> "Tested by this standard the record in these proceedings is devoid of any evidence to establish that the jobs of the six complaining strikers were still available on August 20, 1964, when they applied for reinstatement. The respondent had made a decision during the strike to curtail production. The work force at the end of the strike numbered seventy-one employees, and despite the testimony of the administrative vice-president of respondent that the longest it would take to secure any supplies would be thirty days [RT 73], respondent did not hire any additional employees until October 8, 1964, at a point when its labor force had fallen to sixty-eight employees—three less than at the end of the strike on August 18.
>
> "Petitioner's only support for its argument that the jobs had not been filled, abolished, or absorbed with responses by officers of respondent to questions of the representative of the General Counsel to the effect that respondent intended 'at sometime in the future' to increase production to twenty units per week:
>
> 'Q. But it was your intention to go back to twenty a week at some future time? A. Yes.' [RT 72].
>
> 'Q. And you did intend at all times to get production as quick as possible up to 20 trailers a week? A. Correct' [RT 111].
>
> "But such an intent directed to the future is not determinative of the question of whether or not the jobs had been abolished, tested as of the

> date when the strikers applied for work, two days after the strike ended. Whatever its intent, respondent did not increase its work force until two months after the strike ended, and did not attain the pre-strike level of production until five months after the strike. In light of these circumstances we do not find that the General Counsel has established that the jobs of complainants had not been absorbed or that they were still available. Rather, we believe that the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [Pet. App. A, pp. 18-19].

2. Certiorari should not be granted because the portion of the opinion of the Court of Appeals contested by the Solicitor General is dicta and not necessary to the decision of the case. Petitioner claims that the Court of Appeal relied on the "narrow and technical" holding that "whether or not a striker's former job had been eliminated is 'to be determined on the date on which the striker makes his offer to return to work' ". [Pet. p. 8]. As the Court's own analysis of the evidence quoted above at length indicates, the Court took into account both testimony as to the facts known and the employer's state of mind at the end of the strike, and the facts which had actually developed at the time the job openings occurred. Taken out of context the quoted statement amounts to no more than a truism—obviously if a striker is entitled to preference if unreplaced, the employer has to determine if he has been replaced when he applies for re-employment. But in any event, the quoted statement was not essential to determination of the case. As the lengthy quote above indicates, the evidence was

overwhelming as of the date of the openings that abolishment had taken place. Two months had gone by and employment had actually decreased. Thus, whenever the determination was made, the result in the Court of Appeals was correct.

3. Certiorari should not be granted because this record does not present a suitable vehicle for a Supreme Court determination. The issue in the case was whether these jobs had been absorbed or abolished. While the Respondent put on its direct testimony establishing clearly the reasons why it contended that the jobs had been abolished, the General Counsel presented no witnesses, and produced by cross-examination only the two questions quoted above in Item 1. Thus there was no thorough exploration in this record of all the various types of evidence which would guide the Court in establishing any general rules as to what constitutes abolishment.

Further the position of the National Labor Relations Board throughout this case has been that these employees were unreplaced economic strikers. The record shows that employment had declined from seventy-one employees at the end of the strike to sixty-eight employees at the time of the job openings. Thus, it appears that at least as to three of the job openings involved, this represents an ordinary "replacement of replacements" problem, totally unrelated to the issue supposedly raised.

4. Certiorari should not be granted because the decision of the Court of Appeals is probably correct. The issue in this case is whether jobs had been permanently abolished. The time involved in this case was almost two months. The only other two reported decisions on this

issue both reached the same result, although the times involved were shorter:

N.L.R.B. v. Roure-Dupont Mfg. (2d Cir. 1952), 199 F. 2d ....; one month; and

Atlas Storage Division (1955), 112 NLRB 1175; enforced *Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd.* (7th Cir. 1956), 233 F. 2d 233; three days.

5. This case in no way resembles *N.L.R.B. v. Great Dane Trailers, Inc.*, No. 781, and therefore certiorari should not be granted on the basis of that case. In *Great Dane* the question presented is:

> "The Board found that the employer denied accrued vacation pay to striking employees who did not return to their jobs within about six weeks after a strike began, while awarding such benefits to those employees who did not strike or who abandoned the strike at an early date. The question presented is whether the Board properly held that this conduct violated Section 8(a)(1) and (3) of the National Labor Relations Act, in the absence of specific evidence of the employer's subjective intent to discriminate against the strikers."

Neither in the statement of the "question presented" nor in the Petition in *Great Dane* is there any discussion remotely related to what constitutes abolishment of a position. Conversely, in the present case no issue is presented as to the effect of the absence of an intent to discriminate in determining whether an unfair labor practice was committed. Petitioner contends that both cases deal with the legality of employer conduct which might deter employees from exercising their right to

strike, but Petitioner does not urge this Court to establish any new rule of law. Petitioner only contends that the Court of Appeals "departed from these settled principles" [Pet. App. A, p. 8] in examining a peculiar set of facts.

6. Certiorari should not be granted because the Solicitor General raises a novel issue not litigated or decided below. The Petitioner, by inference, and by the heavy emphasis placed on Article XIII of the Act, suggests that employees who have been replaced should be entitled to a preference in order to further protect their right to strike. This issue was neither briefed nor decided below.

Conclusion.

Wherefore, Respondent respectfully submits that this Court should deny the Petition for Certiorari.

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